IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| KEITH PUNTENNEY, Petitioner,<br><br>vs.<br><br>IOWA UTILITIES BOARD AND DAKOTA ACCESS LLC, Respondents. | ) | CASE NO. CVCV051987 |
| LAVERNE JOHNSON, Respondent,<br><br>vs.<br><br>IOWA UTILITIES BOARD AND DAKOTA ACCESS LLC, Respondents. | ) | CASE NO. CVCV051990 |
| RICHARD R. LAMB, ET AL., Petitioners,<br><br>vs.<br><br>IOWA UTILITIES BOARD, ET AL., Respondents. | ) | CASE NO. CVCV051997 |
| SIERRA CLUB IOWA CHAPTER, Petitioner,<br><br>vs.<br><br>IOWA UTILITIES BOARD AND DAKOTA ACCESS LLC, Respondents. | ) | CASE NO. CVCV051999 |

**BRIEF OF THE RESPONDENT**
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## STATEMENT OF THE CASE

This matter is a judicial review proceeding brought pursuant to Iowa Code § 17A.19 to review the decision of the Iowa Utilities Board (Board or IUB) to grant to Dakota Access, LLC (Dakota Access), a permit for the construction, operation, and maintenance of a hazardous liquid pipeline, pursuant to Iowa Code chapter 479B and the Board's rules at 199 IAC chapters 9 and 11.

On October 29, 2014, the Board opened Docket No. HLP-2014-0001 so that Dakota Access could hold public informational meetings in connection with a proposed hazardous liquid pipeline in each county affected by the proposed route, as required by Iowa Code § 479B.4. Following the meetings, on January 20, 2015, Dakota Access filed with the Board a petition for permit pursuant to Iowa Code chapter 479B to construct approximately 346 miles of 30-inch diameter crude oil pipeline through Iowa as part of a 1,168 mile project to transport crude oil from the Bakken area near Stanley, North Dakota, to an oil transfer station, or hub, near Patoka, Illinois.

After reviewing the petition, on June 8, 2015, the Board issued an order establishing a procedural schedule for the agency proceedings. Thirty-eight persons or entities filed timely petitions for intervention and five filed late petitions; all were granted intervention by the Board. As is the Board's usual practice, all direct testimony and exhibits was prefiled with the agency according to the established procedural schedule. (*See* 199 Iowa Admin. Code § 7.10 for a description of the prefiling process.) The evidentiary hearing, scheduled for cross-examination of over 80 witnesses who had filed prepared testimony, commenced on November 16, 2015, and continued for several days, including November 17-19, 23-24, and 30 and December 1-3 and 7. The transcript of that hearing (not including the prefiled testimony) runs to just over 3,500 pages.

Following briefing by the parties, on March 10, 2016, the Board issued its "Final Decision and Order" granting Dakota Access's petition for a permit. However, the permit was not actually issued until Dakota Access filed, and the Board accepted, certain compliance documents. That process was completed on April 8, 2016, at which time the permit was issued.

Some parties filed applications for rehearing or reconsideration of the Board's decision. The Board issued an order denying those applications on April 28, 2016, and on May 26 and 27, 2016, the Petitioners herein filed their petitions for judicial review. On June 22, 2016, the Court issued an order consolidating these cases to be heard together.

Further facts from the procedural history will be addressed below, as they are relevant.

## ARGUMENT

**Standard of review:** In reviewing the Board's interpretations of the law, the Court is required to give appropriate deference to the views of the agency with respect to matters that have been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(11)(c). However, the Court is not required to give such deference to the Board's views regarding other matters. Iowa Code § 17A.19(11)(a) and (b).

Agency action may be challenged as arbitrary or capricious, but only when the decision was made "without regard to the law or facts." *Doe v. Iowa Board of Medical Examiners*, 733 N.W.2d 705, 707 ((Iowa 2007) (*quoting Greenwood Manor v. Iowa Dep't of Public Health*, 641 N.W.2d 823, 831 (Iowa 2002)). Agency action is unreasonable if the agency acted "in the face of evidence as to which there is no room for difference of opinion among reasonable minds[.]" *Id.; see also Citizen's Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 819 (Iowa 1990). The Court typically defers to an agency's informed decision as long as it falls within a "zone of reasonableness." *S. E. Iowa Co-Op. Elec. Ass'n v. Iowa Utilities Board*, 633 N.W.2d 814, 818

(Iowa 2001) (citation omitted). When considering claims under the unreasonableness standard, the courts generally affirm the informed decision of the agency and refrain from substituting a less-informed judgment. *Al-Khattat v. Eng'g & Land Surveying Examining Bd.*, 644 N.W.2d 18, 23 (Iowa 2002).

Factual findings by the agency must be accepted if supported by substantial evidence in the record. *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting Iowa Code § 17A.19(10)(f)). A district court's review "is limited to the findings that were actually made by the agency and not other findings the agency could have made." *Id.* "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

When reviewing a finding of fact for substantial evidence, the Court judges the finding in light of all of the relevant evidence in the record cited by any party, including that evidence which supports the finding and that evidence which detracts from it. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Evidence is not insubstantial merely because different conclusions may be drawn from it; in fact, evidence may be substantial and support the agency's decision even if the court would have drawn a different conclusion than the agency did. The reviewing court's "task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made." *Id.*

**1. Response to Initial Brief of Sierra Club**

Throughout its initial brief to this Court, Sierra Club makes unsupported allegations that the Board "ignored" certain evidence that Sierra Club favors. As will be shown below, that is

incorrect. The Board considered all of the evidence presented to it, discussed Sierra Club's evidence in its Final Decision and Order, and explained each time why the evidence offered by Sierra Club was or was not persuasive. Sierra Club's evidence was not "ignored."

**a. Prohibiting "friendly cross-examination" is not a denial of due process**

In its September 16, 2015, "Order Taking Administrative Notice, Scheduling and Specifying Hearing Procedures, and Serving Affected Landowners and Parties In Possession" (the Scheduling Order), the Board informed the parties, among other things, that "friendly cross-examination, such as cross-examination of witnesses taking the same side as the cross-examiner, shall not be allowed." (Attach. at 6, Scheduling Order at 6.)[1] On November 2, 2015, just two weeks before the hearing was to start, Sierra Club filed a motion for clarification of the quoted language. Sierra Club argued that a prohibition of questioning of a friendly party's witness would violate due process.

On November 9, 2015, the Board issued an order regarding the motion for clarification. The Board noted that the parties had known since September 16, 2015, that friendly cross would not be permitted; they each had ample opportunity to include all of their direct evidence in their prefiled direct testimony.[2] The Board said:

> One of the main purposes of using prefiled testimony is to reduce the likelihood of surprise at hearing, producing a better record overall. That purpose would be undermined if a party were permitted to present additional evidence in support of its case through cross-examination of the witnesses for friendly parties. A party could, for example, omit key evidence from its prefiled testimony, relying on its cross-examination of friendly witnesses to present the evidence as a surprise at hearing.

"Order Regarding Motion for Clarification of Cross Examination of Witnesses" (Attach. at 35, Clarification Order at 4.) The Board also found that due process does not automatically require

[1] The Board has provided an attachment to this brief with the primary documents cited. Citations are to the document and the attachment page numbers.
[2] Sierra Club submitted the prefiled testimony of nine witnesses on its own behalf.

that parties be permitted to conduct friendly cross and that Sierra Club had not cited any authority for its assertion that it does. Instead, Iowa law recognizes that due process involves a flexible analysis that considers the nature of the proceedings and administrative burdens. *Callender v. Skiles*, 591 N.W.2d 182, 189 (Iowa 1999); *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 145 (Iowa 2013). While the Board acknowledged the importance of the private interests of the parties, it also pointed out that over 80 witnesses had prefiled direct testimony and only 10 days were scheduled for hearing, requiring an average of over 8 witnesses per day, making the ban on friendly cross an administrative necessity.

However, the ban was not absolute. The Board's Clarification Order expressly recognized the right of every party to request cross-examination of a witness for a friendly party in appropriate circumstances, saying:

> This does not mean that a party will never be permitted to cross-examine a witness from a friendly party. If the witness has offered testimony that is truly adverse to the party's interests, then cross-examination of that witness by counsel for the party will be allowed. If this situation should occur, the Board expects counsel for the party desiring to engage in cross-examination to make an appropriate motion, explaining why it should be allowed to cross-examine the witness in a particular situation, how the witness's testimony is adverse to the party's interests and what beneficial purpose cross-examination may serve.

(Attach. at 36-37, Clarification Order at 5-6.) Sierra Club has not identified any point in the hearing where it made such a request; in the absence of such a motion being made and denied, Sierra Club cannot show to this Court that it has been aggrieved or adversely affected by the ban on friendly cross. Stated otherwise, Sierra Club has not preserved any error on this point, as there is no instance in the record to demonstrate any possible harm.

Further, Sierra Club is incorrect when it argues that due process requires that parties be allowed to engage in friendly cross. On the contrary, due process does not even require an opportunity for cross-examination of ***adverse*** persons in some cases. *Woodbury v. McKinnon,*

447 F.2d 839, 844 (5th Cir. 1971). It is not at all uncommon for agencies that hear complex, multi-party contested cases to ban friendly cross. The Maritime Administration of the Department of Transportation does it by rule: 46 C.F.R. § 201.132. The Federal Energy Regulatory Commission does so by order and practice, *see New England Power Co.*, 59 FERC 63008, 1992 WL 80238 (1992). So does the U.S. International Trade Commission; *see*, for example, *In the Matter of Certain Light Emitting Diodes, etc.*, 2004 WL 2613680.

The Board has prohibited friendly cross in other large, multi-party, complex cases before it, such as *Re: Qwest Comm. Corp. v. Superior Tel. Coop., et al*, 2008 WL 5124177 (Iowa U.B. 2008), *4. The practice is a reasonable one in certain cases, such as this one, that have those characteristics, especially where, as here, the prohibition includes a "safety valve" provision that allows parties to ask for an exception.

Finally, Iowa Code § 17A.14 provides, in relevant part, that in contested cases before an administrative agency, "irrelevant, immaterial, or unduly repetitious evidence should be excluded." Friendly cross-examination can be unduly repetitious. The Board did not commit error by limiting friendly cross in advance of hearing, particularly where, as here, the Board expressly reserved to the parties the right to request cross examination of friendly witnesses in appropriate circumstances.

**b. The "public convenience and necessity" does not require service to the public**

Sierra Club argues to this Court that in order to make a finding that a proposed pipeline will "promote the public convenience and necessity" (as required by Iowa Code § 479B.9 before a permit may be issued), the pipeline must involve "directly serving the general public." (Sierra Club Br. at 16.) Sierra Club made the same argument to the Board, where it was considered and rejected. (Attach. at 65-72, Final Decision and Order at 10-17.)

The term "public convenience and necessity" is not defined in § 479B.9; the indefiniteness of the term is intentional and reflects a delegation of authority to the Board to decide in the first instance what factors and circumstances should bear on its determination (subject to judicial review). *Application of National Freight Lines*, 241 Iowa 179, 40 N.W.2d 612, 616 (1950); *S.E. Iowa Elec. Co-Op.*, 633 N.W.2d at 819-20. Here, the courts have confirmed the Board's prior decisions that (a) "convenience" is much broader and more inclusive than "necessity" and (b) in this context, "necessity" means "reasonable necessity," not absolute necessity. *Thomson v. Iowa State Commerce Comm'n*, 235 Iowa 469, 15 N.W.2d 603, 606 (1944).

In each of these cases, the finding of public convenience and necessity was supported, at least in part, by a finding of service to the public. From this, Sierra Club concludes that service to the public is a necessary element of the finding, but cites no such holding from any of the decisions. The Board agrees that a finding of service to the general public can be ***sufficient*** to support a finding of public convenience and necessity, but there is simply no authority for the proposition that it is ***required*** in order to make such a finding; instead, the Board applied the "public convenience and necessity" test as a balancing test, weighing the public benefits of the proposed project against the public and private costs as established by the evidence in the record. (Attach. at 71, Final Decision and Order at 16; *see also S.E. Iowa Co-Op*, 633 N.W.2d at 821, approving the Board's use of a balancing test to determine whether "the substantial benefits [of a proposed project] outweighed the costs….").

In its brief to the Board, Sierra Club recognized and supported a balancing test for making this determination, arguing that when considering the "public convenience and necessity, social losses involving externalities, such as environmental damage and eminent domain, should

be considered." Sierra Club even argued the phrase is essentially a "symbol" that represents a determination of whether the public benefit to be derived from a proposed project justifies granting the requested permit, citing *Professional Motor Home Transport v. Railroad Comm'n of Texas*, 733 S.W.2d 892 (Tx. App. 1987). ("Post-Hearing Brief of Sierra Club Iowa Chapter" at 6-7.) The Board did not commit error by applying the described balancing test to the question of whether the proposed pipeline will promote the public convenience and necessity.

**c. Demand for Bakken oil**

Sierra Club argues that oil production from the Bakken region is diminishing, that some oil producers are leaving the region, and that in the absence of demand for Bakken oil the pipeline will not promote the public convenience and necessity. (Sierra Club In. Br. at 24-26.) The Board addressed these same arguments at pages 37-39 of the Final Decision and Order and made appropriate findings. As previously noted, the fact findings of the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

Before the agency, Sierra Club said that oil production in the Bakken area was declining and claimed that was evidence the area would be depleted of oil in the near future. However, Sierra Club's own Exhibit 26 showed that the recent dip in production was minimal compared to the historic production increases shown on the same exhibit. More specifically, Sierra Club Exh. 26 shows that from January 2007 to October 2014, Bakken oil production increased from 0 barrels per day (BPD) to approximately 1.2 million BPD; then, from October 2014 to September 2015 it dipped about 10 percent, from 1.2 million FPD to 1.1 million BPD. The Board found that this relatively small, short-term reduction was not convincing evidence of a long-term trend of reduced production from the region. (Attach. at 94, Final Decision and Order at 39.)

Further, the Board found it significant that certain shippers have executed long-term take or pay contracts with Dakota Access to utilize the proposed pipeline to transport Bakken crude. (*Id.* at 38.) Under these contracts, the shippers must pay for the pipeline capacity whether they use it or not, a substantial financial commitment that only makes sense if the shippers are confident they will have oil to ship. The Board found these substantial monetary commitments by sophisticated shippers to be persuasive evidence that the alleged possible depletion of oil reserves in the Bakken region was a factor that merited little weight in the Board's decision. (*Id.*)

Sierra Club now claims to this Court that "the IUB failed to consider relevant and important evidence" on this point (Br. at 27), but the only evidence Sierra Club identifies is the same evidence described above. The Board heard the evidence, analyzed it at some length, and explained why the Board found the evidence unpersuasive.

**d. Safety issues**

Sierra Club argues that the Board should not have considered safety issues in determining whether the proposed pipeline will promote the public convenience and necessity because "this issue is irrelevant." (Br. at 27.) Sierra Club also argues that the Board erred when it concluded that compared to railroad, pipelines are a safer way to transport oil and when it evaluated the risks of oil spills. Sierra Club also appears to argue that the Board did not require sufficient financial guarantees from the parent corporations of Dakota Access, although its brief on this point is not entirely clear. (Br. at 37.)

The Board found, based upon the evidence in the record, that "the increased safety associated with pipeline transport of crude oil is significant." (Attach. at 86, Final Decision and Order at 31.) The Board considered the safety-related evidence presented by Sierra Club and

other pipeline opponents and found it simplistic and inaccurate. For example, Sierra Club offered a comparison of the total amount of oil leaked by pipelines and railcars during 2013. However, Sierra Club actually compared only crude oil shipments by rail against ***all*** hazardous liquid shipments by pipeline, giving rail transportation an unfair advantage. Moreover, Sierra Club's comparison failed to consider the relative volumes of crude oil transported or the distance over which it was carried, further disadvantaging pipeline transportation, which carries greater volumes over greater distances. (*Id.*)

On brief to this Court, Sierra Club quotes at length from the testimony of Rebecca Wehrman-Andersen, a witness called by the Iowa Farmland Owners Association. But her analysis also failed to account for the relative amount of oil being shipped by rail or by pipeline or for the distance the oil is being shipped. Further, her calculations, which compared total miles of railroad track to pipeline (*see* Exh. Wehrman-Andersen 1 at 2), overstate the safety of railroad transport by including miles of railway over which crude oil is never shipped.

In the end the Board considered all of the evidence concerning the relative safety of pipeline vs. rail transport and concluded as follows:

> The most valid comparison in this record of the relative safety of rail transport versus pipeline transport considers the shipping method, the amount of crude oil shipped, and the distance it is shipped. It is clear from the USDOT data in Exhibit GC-1 that significantly more oil is shipped more miles by pipeline than by rail, so it is not surprising that the total amount of oil leaked by pipelines is higher. However, on a more equal comparison basis (accounting for both volume of oil carried and the distance it was carried) pipelines are shown to have between one-third and one-fourth the incident rate of railway transport of petroleum products. (*Id.*) As one report stated, "[b]y any measure – number of incidents, fatalities and spilled fluids recovered, pipelines are the safest and most effective form of energy transportation." (Exh. GC Direct at 8, quoting Vern Grimshaw & Dr. John Rafuse, *Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities*.)

(Attach. at 87, Final Decision and Order at 32.) Sierra Club now claims the studies the Board found persuasive were prepared by pipeline-friendly groups but, as Sierra Club admits, the studies used data from the U.S. Energy Information Administration and the Association of American Railroads, among other sources. (Br. at 27-28.) If Sierra Club had doubts about the validity of these studies and these information sources, it should have raised them during the agency proceedings, either in the direct testimony of its own witnesses or through cross-examination of the Dakota Access witness who testified about the studies.

Sierra Club again accuses the Board of ignoring its evidence (Br. at 33), but the fact is the Board fully considered all of the evidence on this point and explained why it found certain evidence to be more persuasive. The Board did not commit error in doing so.

Next, Sierra Club argues that crude oil pipelines sometimes experience spills. (Br. at 33-36.) Sierra Club concludes that because of the possibility of a future spill, the Board should not have issued the permit. (*Id*.)

The Board gave extensive consideration to the safety aspects of the proposed pipeline, even though the federal government has primary authority over the enforcement of crude oil pipeline safety regulation. *Kinley Pipeline Co. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993); 49 U.S.C.App. § 2002(d). The federal government exercises that authority through the Pipeline and Hazardous Materials Safety Administration (PHMSA) of the Department of Transportation, which has adopted applicable safety regulations at 49 C.F.R. parts 194 and 195. Dakota Access testified that the proposed pipeline will meet or exceed all applicable federal safety regulations, as explained in greater detail below. (Exh. SG Dir. at 8.)

Dakota Access witness Stamm described many of the safety features of the proposed pipeline, including the Operations Control Center, monitoring and control technology, the use of

modern system analysis technology, the use of in-line inspection tools, and other features. (Exh. TS Dir. 3-8; Tr. 633-35.) For example, operators at the Operations Control Center for this pipeline will have full-time oversight of the condition of the pipeline to detect leaks, changes in pressure, or deterioration of the pipeline. They will be able to remotely isolate any potential leak by turning off pumps and closing valves on either side of the suspected leak. (Exh. SC Dir at 10-17.)

The Board reviewed the evidence in the record and concluded that Dakota Access has taken and is taking reasonable steps to reduce the safety risks associated with the proposed pipeline. (Attach. at 112, Final Decision and Order at 57.) The Board noted the following: First, Dakota Access will be required to meet all of PHMSA's safety standards and will be subject to PHMSA inspections. Further, the company will exceed those standards in many respects, including x-ray inspection of all main girth welds (rather than the 10 percent required by PHMSA regulations) and the use of thicker-than-required pipeline walls in many areas. (Howard Hearing Exh. 16 at 6.) The cathodic protection system, which protects the pipeline against corrosion, will be activated as the trench is backfilled even though the federal regulations do not required activation until one year after pipeline operations begin. (*Id*.) While federal guidelines require hydrostatic testing for four hours at 125 percent and four hours at 110 percent, Dakota Access will hydrotest for eight hours at 125 percent. (*Id.*) The Board found that these steps, and others described in the record, would tend to minimize the potential for an adverse environmental impact. (Attach. at 108, Final Decision and Order at 53.) That finding is supported by substantial evidence in the record, as shown above. The Board did not commit error in making this finding.

Next, Sierra Club appears to argue that the financial responsibility requirements of the Board's decision are somehow inadequate. (Br. at 37.) However, the fact is that the terms and conditions the Board imposed on the permit far exceeded the minimum statutory requirements for financial responsibility. Iowa Code § 479B.13 requires that an applicant for an HLP permit must satisfy the Board that the applicant has property in Iowa, other than pipelines or underground storage facilities, subject to execution and of a value in excess of $250,000. In the absence of such property, the applicant must file and maintain with the Board a surety bond in the sum of $250,000 for payment of any and all damages associated with the construction, operation, or maintenance of the pipeline. Dakota Access filed that bond with the Board and argued that the Board lacks the authority to establish a higher financial responsibility test. Nonetheless, the Board required more.

First, the Board required Dakota Access to obtain at least $25 million in general liability insurance and to file satisfactory proof of that insurance with the Board. Second, the Board required the parent companies of Dakota Access to provide irrevocable corporate guarantees for remediation of damages from a leak or a spill. (Attach. at 208-209, Final Decision and Order at 153-54.) Those parent companies are sizable entities with significant financial resources; for the twelve months ending June 30, 2015, those three parent companies had consolidated revenues of over $190 billion (Exh. DRD Dir. 21-23) and total market capitalization of over $60 billion. (*Id*.) Dakota Access obtained and filed the required insurance policies (actually, $26 million worth of coverage) and provided the parent company guarantees; the Board reviewed and approved those filings in its April 8, 2016, "Order Accepting Compliance Filings and Issuing Permit."

These are substantial requirements that far exceed the minimum statutory requirement in § 479B.13 for a demonstration of financial responsibility by an applicant for an HLP permit.

Sierra Club now argues that these parental guarantees are inadequate because they do not include all of the current corporate parents, or owners, of Dakota Access. (Br. at 37.) This is incorrect. The Board found that the corporate guarantees that were filed with it are adequate for the purpose of ensuring remediation of any future pipeline incidents, representing guarantees from some very large companies. (As of March 24, 2016, the market capitalization of Energy Transfer Partners was approximately $20 billion and that of Phillips 66 was approximately $46 billion, for a combined total of $66 billion.) The Board found there was no evidence in the record to indicate those assets would be insufficient. (Attach. at 257, "Order Accepting Compliance Filings and Issuing Permit" at 28.) Those guarantees are irrevocable and continue in full force and effect even as other entities buy interests in the pipeline; the guarantees were sufficient before and remain sufficient now. The sale of interests in the pipeline only adds to the number of entities with a financial interest in remediating any spills and restoring the pipeline to service in the event of an incident, even if they have not executed guarantees. In other words, the sale of interests in the pipeline is irrelevant to any issues in this matter.

The Board considered all of the evidence presented on these safety issues and made findings that are supported by substantial evidence in the record. Again, the fact findings of the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

**e. Environmental and cultural issues**

Once again, Sierra Club accuses the Board of ignoring evidence that the Board did, in fact, consider and discuss in its decision. (Br. at 38.) Sierra Club compounds the error by

claiming the Board "violated its own pretrial order" (*Id*. at 39) when, as discussed below, the Board did nothing of the kind. Rather, Sierra Club's real complaint is that the Board did not adopt Sierra Club's position with respect to the required level of environmental and cultural study required for this project. However, the Board's decision is supported by the law and Board precedent and does not constitute reversible error. As previously noted, the fact findings of the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

On September 14, 2015, Sierra Club filed a "Motion to Require Environmental Impact Report." In that motion, Sierra Club acknowledged that the U.S. Army Corps of Engineers and the Iowa Department of Natural Resources have jurisdiction over the environmental and cultural aspects of certain parts of this project. Sierra Club also acknowledged that there is no statutory requirement for an environmental impact report for the entire proposed project in Iowa. Finally, Sierra Club acknowledged that Dakota Access was expected to describe, as a part of its prefiled testimony, the environmental studies and permits required for this project. Sierra Club nonetheless moved the Board to require a comprehensive environmental impact study for the project before deciding whether to grant a permit.

Dakota Access responded to the motion on September 23, 2015, saying (among other things) that numerous government agencies will have a role in the environmental review of the project, including the Corps of Engineers, the Iowa Department of Natural Resources, the Iowa State Historic Preservation Office and the State Archeologist, and the U.S. Fish and Wildlife Service. Dakota Access argued that if Sierra Club thought that review by all of these agencies would be insufficient, Sierra Club should commission its own study and have a witness sponsor it at hearing. Finally, Dakota Access argued, the Board's rules do not require an overall

environmental impact report as a part of the permit process and the Board lacks authority to change the rules of the process in the middle of the proceeding.

On October 5, 2015, the Board issued its "Order Denying Motion to Require Environmental Impact Report." That order expressly recognized Sierra Club's numerous filings and arguments in support of its motion and ruled as follows:

> Sierra Club says that § 479B.1 requires the Board to consider the environmental damage the proposed pipeline might do and asserts that "the Board cannot adequately do so without an accurate independent environmental report." (Motion at p. 3.) However, Sierra Club never explains why a report is the only, or even the most, suitable means for evaluating environmental considerations. The Board has granted many permits in the past without requiring an environmental impact report, so the burden is on Sierra Club to show that the Board's normal procedures are not adequate in this case. Sierra Club has not met that burden; it has not identified any environmental issue that cannot be addressed using the standard procedures, that is, prefiled testimony, hearing with cross-examination, and briefing.
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> * * *
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> The fact remains that the existing agency process has been sufficient to address environmental issues in the past and so far, no one has shown that it will not be sufficient here.

(Attach. at 18-20, Order at 8-10.) Clearly, Sierra Club's evidence and argument was not "ignored," and the Board did not "violate its own pretrial order;" Sierra Club's evidence and arguments were fully considered and the motion was ruled upon in a manner that explains the basis of the Board's ruling. Sierra Club sought an extraordinary measure not required by any statute or regulation and offered only conclusory reasons for that proposal. The record was clear that several other federal and state agencies were already engaged in environmental and cultural studies for the matters within their jurisdiction. The Board has reviewed other applications for HLP permits without requiring a full-blown environmental impact report and without any undue difficulty. Sierra Club failed to carry its burden of persuasion.

Sierra Club's next argument under the environmental heading is that the "IUB claimed that [OCA witness] Thommes testified that all of his concerns would be addressed by the Corps of Engineers and Iowa DNR and he would not recommend any conditions beyond what those agencies would impose (Attach. at 106, Final Decision and Order, p. 51.)" Sierra Club now says this statement may be incorrect. Once again, Sierra Club's claims are not supported by the record.

First, when the Board's order describes testimony of OCA witness Thommes on page 51, it is in the part of the order summarizing the arguments made by Dakota Access; it is not a "claim" by the Board and is not part of the Board's analysis. Moreover, the actual language from the Board's order is rather different; the Board says Dakota Access had argued that "at hearing, OCA witness Thommes acknowledged that there was no basis for imposing environmental conditions beyond those required by the agencies with primary responsibility for protecting the environment. (Tr. 1611.)" (Attach. at 106, Final Decision and Order at 51.) That is an accurate description of the cited testimony and there is no error in accurately describing the record.

Second, Sierra Club says it was not allowed to ask Thommes further questions to clarify his answers. (Br. at 41.) However, after the Board members questioned Thommes (Tr. 1612-20), the witness was excused without Sierra Club making any motion for further cross-exam of the witness. (Tr. 1620.) If Sierra Club had clarification questions for the witness, it should have made an appropriate request; the Board's Clarification Order of November 9, 2015, made that perfectly clear. In the absence of any such request, Sierra Club cannot complain it has been aggrieved or adversely affected by a ruling the Board did not have an opportunity to make.

**f. Jobs and economic impact**

Sierra Club argues the Board should not have considered the economic impact of the proposed project when determining whether the pipeline will promote the public convenience and necessity, as required by Iowa Code § 479B.9. Sierra Club argues economic impacts are irrelevant to the purpose of the pipeline and should not be considered; Sierra Club also argues, once again, that the Board "completely ignored" the evidence that Sierra Club favors. (Br. 42-44.) Once again, Sierra Club's arguments are incorrect and without factual basis.

First, the Iowa Supreme Court has made it very clear that the economic benefits of a project are relevant in Board proceedings like this one. In *S.E. Iowa Co-Op*, 633 N.W.2d at 820, the Court reviewed a Board decision to grant an electric transmission line franchise based solely upon economic considerations. The statutory standard for electric lines (the Board must find that the proposed line "is necessary to use a public use") is very similar to the HLP standard (requiring a finding that the pipeline "will promote the public convenience and necessity"). The Court found "considering the broad standard of 'public use' prescribed by the legislature," the legislature must have "contemplated the Board would consider economic factors" when making that determination. *Id.* at 820. Just like the Court's analysis in *S.E. Iowa Co-Op*, there is no indication in § 479B.9 that the Legislature intended to preclude economic factors from the Board's consideration; instead, the broad standard of "public convenience and necessity" indicates the Board can and should consider such factors in appropriate cases.

Second, the Board did not "completely ignore[] the externalized costs of the pipeline project, such as environmental harm, landowner impacts, and damages from pipeline spills," as alleged by Sierra Club. (Br. at 43.) The Board's Final Decision and Order includes lengthy and substantive discussion of environmental issues, oil spill remediation, and the impact of the

project on affected landowners, *see* pages 47-62, 74-83, and 91-100. The Board will not detail those discussions here; clearly, the issues were not "completely ignored."

**g. Conclusion of response to Sierra Club**

In the end, Sierra Club's brief depends on its argument that a finding that the line will "promote the public convenience and necessity" requires a showing that the line will provide service to the general public. As shown above, that is not a correct statement of Iowa law; the *S.E. Iowa Co-Op* Court described the "public use" standard as a "broad" standard that contemplates the Board will consider and balance a variety of factors, including (in this case) safety considerations, economic benefits, environmental impacts, financial resources for any future remediation that may be required, the burdens imposed on the affected landowners, and other relevant factors. The Board balanced the evidence and arguments for and against the pipeline, considered all of the evidence in the record, and found that the proposed pipeline will promote the public convenience and necessity. (Attach. at 169, Final Decision and Order at 114.) There was no error in doing so.

**2. Response to the Brief of Keith Puntenney**

Mr. Puntenney challenges the reasonableness of the Board's factual findings with respect to the manner in which the proposed pipeline crosses his property. Of course, on judicial review of agency action in a contested case, factual findings by the agency must be accepted if supported by substantial evidence in the record. *Burton v. Hilltop Care Cntr.*, 813 N.W.2d at 256, quoting Iowa Code § 17A.19(10)(f). The Court's review "is limited to the findings that were actually made by the agency and not other findings that the agency could have made." (*Id.*, citations omitted.) Here, substantial evidence in the record supports the Board's decision.

Mr. Puntenney makes a number of statements in his brief that require clarification. When those statements are corrected, it is clear that the Board's decision with respect to his property is reasonable, consistent with the law, and supported by substantial evidence in the record.

Initially, Mr. Puntenney asserts that "the pipeline makes a deliberate diversion from a direct path to cross a corner of Mr. Puntenney's property." (Br. at 2.) In support of that statement, Mr. Puntenney relies upon a hand-drawn map that he prepared and attached to his November 5, 2015, objection filed in the Board proceedings. A copy of that map can be found in the Board's attachment at pages 27-28. The map shows that there are routes across other parcels, but it also shows that the proposed pipeline route runs in a straight line on two parcels to the northwest of Mr. Puntenney's and one parcel to the southeast. In other words, the pipeline is not deliberately diverted across a corner of his property; it follows straight lines as much as possible while avoiding houses and other incompatible land uses.

The record evidence shows that Dakota Access used a GIS software program to evaluate potential alternative routes using datasets that included engineering, environmental, and land use considerations. Engineering considerations include such things as the location of existing pipelines, karst landforms, and powerlines. Environmental considerations include critical habitat areas, fault lines, state parks, national forests, and sites on the national register of historic places. Land use considerations include residences, other buildings, dams, airports, cemeteries, schools, mining, and military installations.

Each of the factors in the datasets was weighted as low, moderate, or high risk based upon the perceived risks associated with routing the pipeline close to, or away from, the factor in question. The software analyzed the alternative routes; the preferred route would use locations identified as low risk, or where necessary moderate risk, but would avoid high risk locations.

The software also tries to use the shortest route in order to cause the fewest overall impacts to land use. The resulting proposed route was then modified to avoid High Consequence Areas, wetlands and water bodies, cultural resource sites, home and farm sites, buildings, irrigation systems, power poles and towers, other structures, and property corners, to the extent possible. Route modifications were also made based upon aerial imagery, site visits, and helicopter reconnaissance. (Attach. at 120-121, Final Decision and Order at 65-66.)

In the end, Mr. Puntenney's argument about re-routing the pipeline to avoid his property amounts to a statement that the pipeline could have been routed across someone else's property. That is an argument that could be made by every affected landowner about every other affected property. The pipeline has to have a proposed route in order to proceed to hearing; Dakota Access explained how it settled on the route that it proposed and the Board found the proposed route reasonable. (Attach. at 123-124, Final Decision and Order at 68-69.)

In this connection, Mr. Puntenney complains that the Board required Dakota Access to re-route the pipeline across two other properties (the Lenhart parcel and the Smith properties) and argues it was arbitrary, capricious, unreasonable, and discriminatory to accommodate those other landowners and not him. However, that argument ignores the significant factual differences between these landowners' situations.

Mr. Puntenney sought accommodation for potential future wind turbines on his property. (Attach. at 50-52, Tr. 3488-90.) However, the extent of his plans for those turbines is that he and his tiler, Dan Rasmussen, "have been talking about this for quite a number of years. We actually would like to put together an investor group of landowners to bring turbines further south." He also said that "Dan and I and some of the other landowners who were talking about this are trying to put together a proposal to approach MidAmerican to use our land." (*Id*.) Thus, Mr.

Puntenney's plans have not advanced beyond talking about trying to put together a proposal; he does not have any wind turbines on his property now; he has not actually approached MidAmerican about future wind turbines; he has no specific proposal to use as a basis for any such conversation; and he has not yet assembled an investor group. The Board found that his plan "is not a sufficiently developed plan to justify denial of eminent domain on this parcel, particularly when it has not been shown that the pipeline would necessarily interfere with the possible future installation of wind-driven turbine generators." (Attach. at 204, Final Decision and Order at 149.)

Mr. Lenhart, in contrast, has four existing turkey barns on his property, the result of at least two past expansions of his operation. (Tr. 3165-6, 3182, 3190-91.) He has had "serious discussions" with the company that owns the birds about the next expansion of the facility of up to three more buildings. (Tr. 3169, 3191.) He knows where the new buildings would be, the overall space they would require, and the size of each building. (Tr. 3169-70.) The Board found it reasonable to require Dakota Access to re-route the pipeline, still on Mr. Lenhart's property, to accommodate Mr. Lenhart's plans. (Attach. at 185-187, Final Decision and Order at 130-32.) His plans are much more firm and developed than Mr. Puntenney's, who has been talking to his tiler "for quite a number of years" but has not advanced any further.

The situation on the Smith property is totally unlike Mr. Puntenney's situation. The Smith family members owned four adjoining parcels and asked that the pipeline be re-routed on their combined property so that it would completely miss one of their parcels and just clip the corner of another, while extending the distance it would cross on their other two parcels. (Attach. at 189-190, Final Decision and Order at 134-35.) Dakota Access witness Mahmoud testified that the company "can absolutely shift that over a little bit … which we're willing to do

if Mr. Smith will work with us with an easement. It's not a question of will we do it. We absolutely will do it." (Tr. 3359-60.) Thus, the route shift on the Smith property is completely different from Mr. Puntenney's situation; it is based on the negotiations of the parties, not tentative plans for future facilities that may never exist.

Next, Mr. Puntenney argues that the impact of the proposed pipeline on his drainage tile was not considered by the Board. (Br. at 6-8.) He says he was not allowed to testify about the impact on his drainage tile at the hearing, but the fact is that he was permitted to pre-file any direct testimony he wanted the Board to consider, in advance of the hearing. (Attach. at 3, Scheduling Order at p. 3.) By that order, Mr. Puntenney was fully aware of the requirement for prefiled testimony; his decision not to avail himself of that opportunity is not error on the part of the Board.

Further, Mr. Puntenney was allowed to adopt his objection filed January 13, 2015, as his testimony, and all of his supporting exhibits were admitted to the record. (Attach. at 45-47, Tr. 3483-85.) In the objection, Mr. Puntenney testified to his concerns about his drainage tile. (Attach. at 21.) In his objection, he claimed that the proposed pipeline would function as a "dam" of some sort, causing him additional damages, but Dakota Access witness Blood made it clear that underground water will flow over and under the pipeline without difficulty. (Attach. at 38-42, Tr. 1911-15.)

As for Mr. Puntenney's more general claim that the Board failed to consider the possible impact of the pipeline on his plans for future installation of drainage tile, once again his plans were not shown to be so firm as to justify action by the Board. His November 5, 2015, objection included an undated tile map described as "Proposed Tile" with no indication of any construction timeline. His testimony at the hearing was that "I've been doing tiling on this property off and

on as necessary, and I did quite a bit of it last year." (Attach. at 48, Tr. 3486.) He offered no schedule, no predicted work areas, and no time estimates for any future tiling projects. Again, on this record, his plans are not sufficiently developed to require any particular action by the Board. If and when he installs the tile in the future, Dakota Access will be required to compensate Mr. Puntenney for any increased costs caused by the presence of the pipeline, pursuant to Iowa Code § 479B.20(1)(g).

Mr. Puntenney also claimed in his November 5, 2015, objection that having the pipeline running across the corner of his property would preclude installation of wind turbines anywhere on his entire 80 acres, but other than conclusory language about "safety reasons" and "distance requirements" he provided no basis for his claim. (Attach. at 27, Objection at 7.) As noted above, Mr. Puntenney's plans for future wind turbine installations are, at best, in the very early stages and may never come to fruition. They do not provide a basis for any action by the Board.

In the end, Mr. Puntenney, a full party to the Board proceedings, had reasonable opportunity to present his case to the Board, and he did, in fact, present his evidence and argument. The Board gave full and fair consideration to his case, made a decision, and explained the basis for that decision, based upon the substantial evidence in the record. Mr. Puntenney may disagree with the Board's decision, but that does not establish any reason for reversing the Board's decision.

**3. Response to the Brief of LaVerne Johnson**

Like Mr. Puntenney, Mr. Johnson challenges the reasonableness of the Board's factual findings with respect to the manner in which the proposed pipeline crosses his property. As previously indicated, on judicial review of agency action in a contested case, factual findings by the agency must be accepted if supported by substantial evidence in the record. *Burton v. Hilltop*

*Care Cntr.*, 813 N.W.2d at 256, quoting Iowa Code § 17A.19(10)(f). The Court's review "is limited to the findings that were actually made by the agency and not other findings that the agency could have made." (*Id*., citations omitted.) Here, substantial evidence in the record supports the Board's decision.

In his brief to this Court, Mr. Johnson also claims that the IUB "ignored" his testimony and evidence regarding his drainage tile and asks that Dakota Access be required to re-route the pipeline around his property, onto the property of other landowners. (Br. at 5.) The fact is that the Board gave every consideration to Mr. Johnson's evidence and argument and ordered substantial relief to address his concerns, requiring Dakota Access to bore the pipeline under his deepest drainage tile. (Attach. at 181-183, Final Decision and Order at 126-28.)

As the Board acknowledged in the Final Decision and Order, Mr. Johnson has installed layers of drainage tile on one of his parcels because it holds water. One of the tile lines, a 24-inch concrete main, is buried up to 22 feet deep. (Exh. LaVerne Johnson Direct at 1.) In his direct testimony, he expressed his concern that the pipeline would cut through those lines and cause them to fail to discharge water. (*Id*. at 4.) He specifically testified that "[u]nless the pipeline goes under all of these stacked tile lines, it will have to go through them." (*Id*. at 5.)

Relying on this testimony, the Board granted Dakota Access the right of eminent domain over Mr. Johnson's parcel "upon the condition that the pipeline will be bored under the 24-inch concrete main." (Attach. at 182, Final Decision and Order at 127.) This was intended to address Mr. Johnson's expressed concerns.

At hearing, Mr. Johnson took a somewhat different position than he did in his direct testimony; he indicated that the soil under the main was potentially unsuitable; specifically, he testified that "[i]t's a really difficult spot to get through, and I think boring, if you hit that, I think

it would just -- I don't think it would be successful." (Tr. 3027.) The Board acknowledged Mr. Johnson's concerns in its order, saying "Johnson suggests that this will not be successful because of the type of soil under the 24-inch main; however, there appears to be no reasonable alternative to granting eminent domain along the route proposed by Dakota Access and boring under the 24-inch main appears to be the least intrusive alternative." (Attach. at 182, Final Decision and Order at 127.) The Board's decision is reasonable and supported by substantial evidence in the record and should be affirmed.

**4. Response to the Brief of Lamb, et al.**

**a. The Iowa eminent domain statutes are Constitutional**

Petitioners Lamb, et al., argue that Iowa Code §§ 6A.21(2) and 479B.16 are "facially unconstitutional" because, in some circumstances, they may allow a private entity to use the state's power of eminent domain to condemn private property, citing *Robinson Township v. Commonwealth of Pennsylvania,* 2016 WL 5463054 (Penn. Sept. 28, 2016). However, the *Robinson Township* decision is distinguishable because of significant differences between the Pennsylvania statutes at issue there and the comparable Iowa statutes. In *Robinson Township,* the statute itself granted the power of eminent domain to any corporation that transported, sold, or stored natural gas for purposes of underground storage. (Section 3241 of Act 13 of Feb. 14, 2012, Penn. P.L. 87; quoted in *Robinson Township,* slip op. at 78-79.) The Pennsylvania Court held that this broad grant of authority for uses that may not serve a public purpose was facially unconstitutional. (*Id.* at 83-86.)

Iowa Code chapter 479B is structured differently and cannot result in a grant of the power of eminent domain for uses that do not serve a public purpose. Under § 479B.16, the power of eminent domain is vested in a pipeline company only if the company has been granted

a permit by the Board, and under § 479B.9 the Board may grant such a permit only after determining that "the proposed services will promote the public convenience and necessity." Thus, under the Iowa statutes the power of eminent domain can only be granted to a pipeline company if the company has made a satisfactory showing, on the record, that the project will serve a public purpose, that is, that it will promote the public convenience and necessity. The reasoning of *Robinson Township* is inapplicable to chapter 479B.

Petitioners also argue that Iowa Code § 6A.21(2) is unconstitutional for the same reasons, but again they ignore the key differences in the statutory schemes. Section 6A.21(1) limits condemnation of agricultural land, but § 6A.21(2) provides an exception for, among other things, "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce…." Thus, § 6A.21(2) incorporates the same protections as § 479B.9, because any entity that is subject to the jurisdiction of the Board will not be granted the power of eminent domain until it has shown the proposed project is "necessary to serve a public use" (for electric transmission lines, *see* § 478.4) or "will promote the public convenience and necessity" (for underground pipelines and natural gas storage facilities, *see* §§ 479.12 and 479B.9). Again, this is not a statutory grant of condemnation authority, as was the case in *Robinson Township*. Absent any showing of public benefit, the Iowa statutes require an appropriate showing of public benefit first. The Iowa statutes are not unconstitutional.

The Board notes that in this section of Petitioners' brief they argue that "the alleged public benefits ***to Iowans***…are speculative…." (Br. at 9.) This is the first of many times in their brief that Petitioners attempt to narrow the "public benefit" inquiry by limiting consideration to Iowa-specific benefits. While the Board properly focused its analysis of economic benefits on Iowa, the Board also recognized that safety does not stop at state lines. Safe transport of crude

oil is a benefit to all and should be considered as such, as discussed in greater detail below. (*See* Attach. at 163-169, Final Decision and Order at 108-114.)

**b. The definition of "public use" and the Constitution**

Petitioners argue that "public convenience and necessity" is a different standard than "public use" for purposes of the exercise of eminent domain, citing an Illinois decision and a dissenting opinion in *Kelo v. City of New London, Conn.* 545 U.S. 469 (2005). (Br. at 12.) In doing so, they ignore relevant Iowa law.

The Iowa Supreme Court has long held that in the context of permit proceedings under the jurisdiction of the Board (or its predecessor, the Iowa State Commerce Commission), eminent domain may be granted for a project that is shown to be "necessary," and "an absolute necessity for taking the particular land need not exist. A reasonable necessity is sufficient." *Vittetoe v. Iowa Southern Utils. Co.*, 255 Iowa 805, 123 N.W.2d 878, 881 (1963), citations omitted. Clearly, the *Vittetoe* Court considered that a showing of "reasonable necessity" was sufficient to establish a "public use" for Constitutional purposes.

The Supreme Court of the United States agrees. The Fifth Amendment of the Constitution of the United States limits the power of eminent domain such that private property may only be taken for "public use," but that does not mean that the property can only be taken for use by the general public. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005). There are three types of "public use" for which the government can take private property: (1) public ownership, like national parks, interstate highways, and military bases; (2) private ownership for a public use, such as railroad lines, electric transmission lines, and natural gas pipelines; and (3) private ownership for a public purpose, such as the removal of urban blight or the construction of low-income housing. *Kelo*,

545 U.S. at 497-98 (O'Connor, dissenting). Under *Kelo,* the concept of public use is broadly defined, representing a policy of deference to legislative judgments in this field.

The Iowa Constitution, Article I, Section 18, similarly provides that private property shall not be taken for public use without just compensation. The Iowa Courts have also long recognized that "public use," in this context, does not necessarily require that the property will be used by the general public. "The test of public character is not in the number of persons or corporations [that will be served], but in the character of the use to which the [facility] will be put." *Reter v. Davenport, R.I. & N.W. Rwy. Co.*, 243 Iowa 1112, 1119, 54 N.W.2d 863, 867 (1952). Thus, the fact that a proposed facility will be used "by only a few of the public having the prescribed qualifications is legally insignificant." *Simpson v. Low-Rent Housing Agency of Mount Ayr*, 224 N.W.2d 624, 630 (Iowa 1974). "It is not essential that the entire community or even any considerable portion of it should enjoy or participate in an improvement in order to make it a public one." *Id.*, quoting *Dornan v. Philadelphia Housing Auth.*, 331 Pa. 209, 200 A. 834, 840 (1948). Petitioners' claimed distinction between "public use" and "public convenience and necessity" is without merit.

Moreover, even the authorities relied upon by Petitioners do not really support their arguments. For example, the Illinois case, *Southwestern Illinois Development Auth. v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002), merely holds that "public purpose" and "public use" are terms that are "somewhat loosely defined" and

> The term "'[p]ublic purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution." [Citation omitted.]

(*Id.* at 8-9.) This notion of flexibility and capability for expansion undercuts the restrictive definitions that Petitioners assert and reflects the broader view that the reviewing authority (here,

the Board) may consider and balance a variety of factors when making the determination of whether a proposed project will serve the public. *South East Iowa Co-Op*, 633 N.W. 2d at 821.

Petitioners attempt to restrict "public use" to situations in which the public will have a right to use or enjoy the property after condemnation. (Br. at 14-15.) However, as discussed above, that interpretation has already been rejected by the Iowa courts. *Reter*, 54 N.W. 2d at 867; *Simpson*, 224 N.W.2d t 630. Similarly, Petitioners' attempt to distinguish *Kelo* on the basis of insignificant factual differences is unavailing; the legal principles of the majority decision are fully applicable here.

Next, Petitioners claim that *Kelo* "has been statutorily pre-empted by the Iowa legislature," specifically the enactment of Iowa Code § 6A.22, which excludes the consideration of the economic development arguments used in *Kelo* when determining whether a project meets the public use or purpose test. (Br. at 16-17.) But § 6A.22 does not apply to Board permitting and franchising proceedings; the Iowa Supreme Court has held that the Board can consider the economic impacts of a proposed project when considering such a petition. *South East Iowa Co-Op.* 633 N.W.2d at 819-20.

Further, even if § 6A.22 were to apply in this situation, the definitions of "public use," "public purpose", and "public improvement" under that section include "the acquisition of any interest in property necessary to the function of a public or private utility, ***common carrier,*** or airport or airport system." (Iowa Code § 6A.22(2)(a)(2), emphasis added.) Dakota Access is a common carrier as defined by federal law (Interstate Commerce Act, § 1(3)**)**. As such, Dakota Access must offer services to shippers on a non-discriminatory basis. That process, overseen by the Federal Energy Regulatory Commission, included an "open season" allowing all interested shippers to compete for pipeline capacity. It also reserves 10 percent of the pipeline's capacity

for "walk up" shippers who will pay set rates. This dedication to public service makes Dakota Access a "common carrier" and the federal definition reflects that fact. That means that the economic development activities associated with the proposed pipeline can be considered in connection with determining whether the project will serve a public use. (Iowa Code § 6A.22(2)(b).)

Petitioners quote Justice Kennedy's concurring decision in *Kelo* that a "court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring). The Board agrees with the legal principle quoted, but there has been ***no*** showing on this record that the identified public benefits of this project are "incidental or pretextual." Instead, the record shows that the safety benefits of the pipeline, to Iowans and to others, are substantial, as pipeline transportation is 3 to 4 times safer than transportation by railroad. (Attach. at 78, Final Decision & Order at 23.) Further, even the pipeline opponents admit the Iowa-only economic benefits of the project are at least $787,000,000 during the construction period alone, a substantial figure. (Attach. at 96-102, Final Decision and Order at 41-47) (Gannon Exh. MI-11.) Even after construction, the project will continue to offer economic benefit through payment of approximately $27 million per year in property taxes in Iowa and 25 long-term direct, indirect, and induced permanent jobs in Iowa. (Dakota Access Cross Exh. 7 at 3.)

In addition, the pipeline will provide transportation services to a market where there is a clear demand for those services. The shippers who have signed contracts for 90 percent of the capacity of this pipeline, and the shippers who will use the remaining capacity on a "walk up" basis, represent a segment of the public that should be served. (Attach. at 165, Final Decision and Order at 110.)

The Petitioners have not, and cannot, make a "clear showing" that the public benefits associated with this project are only incidental or pretextual.

**c. The Board correctly determined that it has jurisdiction over Dakota Access for purposes of Iowa Code § 6A.21**

Petitioners argue that Iowa Code § 6A.21(1)(c) bars Dakota Access from exercising eminent domain over agricultural lands. However, § 6A.21(2) provides, in relevant part, that the bar in § 6A.21(1)(c) does not apply to "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce…." The Board determined that Dakota Access is a company under the jurisdiction of the Board such that the exception applies and Dakota Access can be permitted to condemn agricultural land pursuant to the terms and conditions of its 479B permit. (Attach. at 175-176, Final Decision and Order at 120-21.) Petitioners disagree, arguing the Board's jurisdiction over Dakota Access is legally insufficient to allow Dakota Access to qualify for this exception.

The Board's jurisdiction over Dakota Access is extensive and continuing. First, the company must have a chapter 479B permit from the Board before it can begin to even construct, let alone operate, its proposed pipeline. In that permit proceeding, the Board could have denied a permit and prevented the project entirely, a powerful demonstration of jurisdiction. The Board also had the authority to make the permit subject to a variety of terms and conditions and the Board exercised that authority in many areas to order Dakota Access to grant the affected

landowners increased rights and protections, further demonstrating that the Board has jurisdiction over Dakota Access.

The Board has continuing jurisdiction to hear complaints against Dakota Access and, in appropriate cases, to assess civil penalties pursuant to Iowa Code § 479B.21. The Board also has the authority to review and approve or deny any future sale or transfer of the permit pursuant to § 479B.14. That jurisdiction also continues for the full life of the pipeline. There is no denying that the Board has jurisdiction over Dakota Access in the plain meaning of the word; the literal language of the statute requires that the exception in § 6A.21(2) apply to Dakota Access.

Petitioners argument that § 6A.21(1)(c) "requires that the IUB have ***all*** of its statutory jurisdiction over Dakota Access" (Br. at 30, emphasis added) is without merit and inconsistent with the statute. For example, petitioners argue that the fact that a federal agency, PHMSA, will oversee the safety and inspection of the proposed pipeline means that the Board lacks sufficient jurisdiction to grant Dakota Access the power of eminent domain. (Br. at 31.) The argument proves too much; PHMSA has primary safety jurisdiction over ***all*** hazardous liquid pipelines in Iowa. If Petitioners' argument were correct, then the Board would be unable to grant any HLP permit holder the power of eminent domain, and all of § 479B.16 (which provides that a pipeline company granted a permit "shall be vested with the right of eminent domain") would be meaningless. It cannot be presumed that the Legislature intended such an absurd result. *State v. Torpey*, 735 N.W.2d 200 (Table), 2007 WL 1202380 (Iowa Ct. App.), citing *Janson v. Fulton*, 162 N.W.2d 438, 442 (Iowa 1968).

Now, Petitioners argue that under the principle of *ejusdem generis*, the list of entities entitled to rely upon the exception in § 6A.21(2) must be limited to any "persons, companies, or corporations" that are related to or affiliated with a utility, such as a subsidiary or affiliate,

because those words follow the word "utilities." (Br. at 28.) *Ejusdem generis* is a principle of construction that provides that in some circumstances, when general words follow specific words in a statute, the general words are read to include only objects similar to the objects of the specific words. *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 715 (Iowa 2005). However, in using this doctrine, "it is important to keep in mind that it is not applied in a vacuum, and disputes cannot be resolved by merely tying the issue 'to the procrustean bed of *ejusdem generis*.'" *Id.*, citing *U. S. v. Weadon*, 145 F.3d 158, 162 (3rd Cir. 1998). There are several conditions that must be met before the doctrine is applied, and the most important is identification of the class based upon the purpose or aim of the statute. (*Teamsters Local* at 715-16.)

Here, Petitioners' proposal would leave the list of entities in § 6A.21(2) without meaning. To qualify for the exception, even as a "utility," the entity must be "under the jurisdiction of the Iowa utilities board…." If the remainder of the list is limited to entities that are affiliated with a utility, then the list becomes meaningless, as the Board has limited or no jurisdiction over most utility affiliates. (*See* Iowa Code § 476.71 *et seq.*, giving the Board specific authority to review the records of public utility affiliates and transactions between utilities and their affiliates.) If Petitioners' interpretation was adopted, then the list of other entities would have no force and effect because no affiliated entity would satisfy the jurisdictional requirement of the statute. Thus, application of the doctrine would leave the list without meaning, which cannot accomplish the purpose or aim of the statute within the meaning of *Teamsters Local*.

Rather, the words in the list should be given their ordinary meanings and the exception to § 6A.21 should be read to include "companies under the jurisdiction of the Iowa utilities board."

As shown above, the Board found Dakota Access is a company that is subject to the Board's jurisdiction, so the exception in § 6A.21(2) applies to Dakota Access.

### d. Iowa Code § 6A.22 does not prevent the Board from considering economic factors in a chapter 479B proceeding

This issue was addressed in section 4.b of this brief, where the Board explained that the Iowa Supreme Court has held that the Board can consider economic factors when deciding whether to approve a project like this one. *South East Iowa Co-Op*, 633 N.W.2d at 819-20. And, even if § 6A.22 were applicable, the prohibition of consideration of economic benefits does not apply to a "public or private utility, ***common carrier***, or airport or airport system." Section 6A.22(2)(a)(2), emphasis added. Dakota Access is a common carrier under federal law. Interstate Commerce Act § 1(3).

As noted previously, those economic benefits are substantial. Even the pipeline opponents admit the Iowa-only economic benefits of the project are at least $787,000,000 during the construction period alone (Attach. at 96-102, Final Decision and Order at 41-47) (Gannon Exh. MI-11), while Dakota Access and its supporters argued the benefits would be in excess of $1 billion. (Exh. MAL-1.) The project will continue to offer economic benefit throughout its life in the form of payment of approximately $27 million per year in property taxes in Iowa and 25 long-term direct, indirect, and induced permanent jobs in Iowa. (Dakota Access Cross Exh. 7 at 3.)

### e. The Board properly considered safety considerations

As noted above, Petitioners try to limit the consideration of the greater safety of pipeline transportation to Iowans; they have to, in order to create their algebraic analysis[3]. However, the Board expressly determined that it can consider out-of-state benefits when determining whether a proposed project will promote the public convenience and necessity (Attach. at 73-76, Final Decision and Order at 18-21) and the Petitioners have not directly challenged that ruling. Here, the record made before the agency establishes that it is safer to ship crude oil by pipeline than by rail tanker. (Attach. at 87, Final Decision and Order at 32.) Opponents of the pipeline offered flawed analyses that compared apples to oranges or failed to account for shipping volumes and distances (*Id*. at 31-32); the Board found that US Department of Transportation data shows that pipelines have one-third to one-fourth the incident rate of rail tankers (measured on the basis of incidents per ton-mile transported). (Exh. GC-1.) Or, as one witness testified, "[b]y any measure – number of incidents, fatalities and spilled fluids recovered, pipelines are the safest and most effective form of energy transportation." (Exh. GC Direct at 8, quoting Grimshaw and Rafuse, *Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities*.)

As the Board explained in the Final Decision and Order, the total amount of Bakken oil produced will be driven by the marketplace demand for crude oil, not by the shipping method. The amount may be greater than current production levels or it may be less, but once that oil is produced, it must be shipped to the refineries, primarily by rail or by pipeline. If production is

[3] Petitioners' analysis is flawed because it fails to consider benefits outside of Iowa. For whatever it may be worth, it is also flawed because it relies upon incorrect information offered by another pipeline opponent. Petitioners say that 40,000 tanker cars of crude oil travel through Iowa each year and assert that is equivalent to 74,000 barrels per week. (Br. at 50.) They cite the Board's Final Decision and Order for these numbers, but at that point in the order the Board is summarizing the evidence offered by another opponent of the pipeline; those numbers are not Board findings. Moreover, the calculation of barrels per week is incorrect. A typical rail tanker car holds about 680 barrels of crude oil. (Tr. 352.) Multiplying 40,000 cars by 680 barrels gives 27.2 million barrels of oil per year, or 74,500 barrels per day. It appears that the Petitioners may have confused barrels ***per day*** with barrels ***per week.*** The Board is not endorsing any of Petitioners' figures with this analysis, but if these numbers are going to be used then they should be correct.

increased from current levels in response to market conditions, the pipeline may not reduce the absolute number of rail shipments of crude oil, but oil that is shipped by pipeline is significantly less likely to be spilled than oil shipped by rail. Therefore, this pipeline will reduce the overall risk of crude oil spills, both in Iowa and elsewhere, because every barrel shipped by pipeline is not shipped by rail. (Attach. at 87-88, Final Decision and Order at 32-33.) The Board found this public benefit was entitled to significant weight in the agency's analysis of whether the proposed pipeline would promote the public convenience and necessity. (*Id*.)

As previously noted, the fact findings of the agency must be accepted if supported by substantial evidence in the record. *Burton,* 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

**f. The Board acted properly in issuing the permit and granting the power of eminent domain**

Petitioners argue that the Board should not have issued the permit or granted Dakota Access the power of eminent domain and as a result, the pipeline represents a continuing trespass on their lands. (Br. 59-69.) Because, as shown in the preceding sections of this brief, the Board properly issued the permit and authority to condemn, the Board will not address Petitioners' arguments and theories regarding the legal status of a pipeline built without a permit.

## CONCLUSION

The Board's decision to issue a permit to Dakota Access is consistent with law and supported by substantial evidence in the record. As such, it should be affirmed.

Dated this 28th day of October 2016.

Respectfully submitted,

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ATTORNEYS FOR THE IOWA UTILITIES BOARD

PROOF OF SERVICE

I hereby certify that the foregoing document was automatically served electronically on all parties registered with the Electronic Filing System for this matter on October 28, 2016.

Signature: /s/ David J. Lynch .